SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 962

SOUTH BAY DAILY BREEZE, a Division of Southern California Associated Newspapers, Inc.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petitioner's Reply Brief in Support of Petition for Writ of Certiorari.

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Three of respondent's arguments in opposition to this petition deserve reply, although none of them rebuts the reasons stated in the petition for granting the writ.

I.

The only ground advanced by respondent in opposition to this Court's review of petitioner's first question —whether the exclusionary rule applies to evidence introduced by the Government in administrative cease-and-desist proceedings—is that the statement of the court below on this issue is dictum (Opp. Br. 8, n.5). Significantly, respondent does not attempt otherwise to avoid the admitted conflict between the decision below and *Knoll Associates v. FTC* with respect to this issue.

Respondent's argument lacks merit. The questions presented to the Ninth Circuit were whether the Fourth

Amendment exclusionary rule applies to the Board's proceeding, and if so, whether it requires that the evidence be excluded. The court resolved both in the negative. Resolution of either of these questions was sufficient to sustain the Ninth Circuit's decision, and therefore, neither is dictum. As this Court has explained:

> ". . . [W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.'" *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924) (Citations omitted).

Accord, Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949); *Massachusetts v. United States*, 333 U.S. 611, 623 (1948); *Application of Hession*, 296 F. 2d 930, 935 (C.C.P.A. 1961).

II.

As to petitioner's second question—whether the Fourth Amendment requires the exclusion of evidence obtained through private theft and introduced by the Government in administrative proceedings—respondent purports to distinguish *Knoll Associates v. FTC* on two grounds: (a) that unlike the General Counsel in this case, the FTC's attorney used the documents with knowledge that they had been stolen; and (b) that unlike Gillis, the thief in *Knoll* took the documents for the purpose of assisting the Commission. The distinctions are untenable.

Contrary to respondent's statement (Opp. Br. 5), the General Counsel offered the document into evidence

after Gillis testified how he had obtained it. After the document was identified and authenticated (R.T. 89-93) Gillis described on *voir dire* examination by petitioner's counsel how he had acquired it (R.T. 93-94). Over petitioner's objection, the General Counsel then offered it into evidence (R.T. 95). Thus, conceding *arguendo* that the General Counsel did not know of Gillis' theft until the hearing,[1] he learned of it before using the stolen document as evidence. Similarly in *Knoll,* counsel for the Federal Trade Commission sought to use documents after learning that they had been acquired by theft. The "critical link between the individual and the government" (Opp. Br. 8) is present in both cases and respondent's distinction on this ground fails.

Respondent's second distinction—that the motives of the two thieves were different—is immaterial to the questions presented. As explained in the petition, the Seventh Circuit's opinion makes clear that the thief's motives were irrelevant to its decision to exclude the evidence (Pet. 11). Gillis' motives are likewise unimportant to the issue presented here.

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[1]There are strong inferences to the contrary. Respondent declares that Gillis testified that he had never discussed his action with an agent of the Board (Opp. Br. 5). In fact, however, Gillis testified only that he did not discuss his action with a Board agent prior to his copying of the document (R.T. 99, ln. 19-21). The General Counsel had the document in his possession before it was marked for identification (G.C. Exh. 18). It is reasonable to infer therefrom that he read it before the hearing and discussed with Gillis how he had obtained it. Indeed, the nature of the document itself suggests that the means by which Gillis obtained it were questionable.

III.

Respondent also maintains that Gillis' theft cannot be attributed to the charging party, the Los Angeles Newspaper Guild, because it did not authorize him to steal documents (Opp. Br. 6, n. 4). This argument ignores the findings of the Board about the intimate relationship between Gillis and the Guild during the organization campaign.

When the campaign started, Gillis and a Guild representative conferred about the solicitation of authorization cards. The representative supplied Gillis with copies of other Guild contracts, information about Guild dues, and instructions about soliciting employees (Pet. App. B, pp. 22a-23a). Gillis then distributed cards and solicited signatures. During the course of the campaign he stole the document in question. Gillis testified that his purpose in taking it was to refute statements of company representatives in the campaign (R.T. 98-99).

The Board found that Gillis was one of two "key" solicitors for the Guild (Pet. App. B, p. 23a). Two of the Guild's fifteen cards were rejected below because Gillis had misrepresented their legal effect (Pet. App. A, pp. 11a-12a; Pet. App. B, pp. 46a-47a). Although there is no evidence that the Guild authorized Gillis to misrepresent the nature of the cards he solicited, his misstatements were attributed to the Guild in the unfair labor practice proceeding. Similarly, although there is no evidence that the Guild instructed Gillis to rifle his supervisor's desk when it appointed him a solicitor, he did so during the campaign to aid the Guild's solicitation effort. The connection between Gillis and the Guild is thus entirely sufficient for purposes of the questions here presented.

Conclusion.

Respondent's brief is most significant for what it does not contain. The only reason advanced in opposition to the first question presented in the petition is technical and erroneous. By failing to address the issue itself, respondent has emphasized the importance of a resolution by this Court of an admitted conflict between the Courts of Appeals. A quibble about the connection between Gillis and the Guild and an unsuccessful distinction between the decision below and *Knoll Associates v. FTC* (based in part on a misstatement of the record in this case) constitute respondent's opposition to the second question in the petition. Finally, respondent's only opposition to this Court's revew of petitioner's third question—whether the National Labor Relations Act prohibits the enforcement of a Board order based on evidence obtained through theft of the charging party—is its declaration that Gillis' theft was unauthorized. Again, respondent has accentuated the importance of this basic issue by electing not to discuss it.

For the reasons stated, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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February 3, 1970.

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